

ASIAN SEMINAR ON CONSUMER LAW
Kuala Lumpur, Malaysia
9 - 12 August 1993

CONSUMER ACCESS TO JUSTICE

Mimi Kamariah Majid

FACULTY OF LAW, UNIVERSITY OF MALAYA
INTERNATIONAL ORGANISATION OF CONSUMERS' UNIONS (IOCU)
REGIONAL OFFICE FOR ASIA AND THE PACIFIC (ROAP)

ASIAN SEMINAR ON CONSUMER LAW

9 - 12 AUGUST 1993

KUALA LUMPUR, MALAYSIA

CONSUMER ACCESS TO JUSTICE - AN OVERVIEW

S. SOTHI RACHAGAN

MIMI KAMARIAH MAJID

Faculty of Law

University of Malaya

Kuala Lumpur, Malaysia

I. INTRODUCTION

Frequent reference to the term "consumer access to justice" is found both in academic and popular literature on consumer related issues. However, there appears to be no consensus as to what the term means.

In more extended treatment, the term "consumer access to justice" has been taken to encompass all the means open to consumers or consumer organisations to right perceived wrongs or even to prevent future abuses. Activities undertaken to mitigate the harshness of production systems, be it free market systems or public enterprise systems, efforts to expose inefficiency, insensitivity and corruption in enforcement agencies and government in general, and programmes aimed to educate consumers to be critically aware of their rights might all properly be subjects of such an extended discussion. In fact, these measures may well be the more effective remedies for the problems of the less economically fortunate of consumers.

So that this paper remains focused, the term "access to justice" is here defined more restrictively and as involving:

- a) the existence of substantive rights conferred by law; and
- b) access to processes or mechanisms for effective enforcement of these substantive rights.

This paper does not pretend to be a comprehensive survey of developments in both these areas. It merely indicates the major trends and focuses on some areas that it is hoped will be useful for deliberations at this seminar.

2. CONFERRING SUBSTANTIVE RIGHTS

2.1 CODIFICATION

Consumer law, here defined to mean the legal manifestation of the desire to protect the consumer interest, is of relatively new origin.

The consumer is a recently recognised subject in law (Bourgoignie, 1992). Thirty years ago, no statute defined the term "consumer". In Malaysia, the term was first included in the **Hire Purchase (Amendment) Act 1992**.

The campaign for, and the enactment of, consumer law may be characterised as involving three phases, not necessarily in chronological order. In fact, the three phases overlapped.

In the first place, the campaign was to achieve amendments to existing laws and to insert provisions that sought to distinguish a consumer transaction from other transactions. An example of such an amendment is that of the Sale of Goods Acts in various countries. It was a characteristic of earlier such statutes to provide for implied terms as regards fitness for purpose and merchantability but to permit these to be excluded by way of express provisions in the contract of sale and purchase. The amendments distinguished consumer sales from other categories of sale and specified that the implied terms may not be excluded in consumer sales even by way of express provisions in the contract.

In the second phase, the campaign was for new statutes that focused on specific problems (trade descriptions, advertising, door-to-door sales, distance selling, safety of particular products, etc.). Consumers were given additional protection in these statutes. It, however, soon became apparent that such piece-meal legislation had severe limitations. New problems kept coming to the fore and the law focusing on specific areas was inadequate to deal with these new problems. Legislation handling door-to-door sales could not handle mail order sales, or electronic media sales. In the area of consumer credit for instance, the piece-meal approach (moneylending, hire-purchase, pawnbroking etc.) resulted in separate statutes that lacked any functional basis, and distinctions between one type of transaction and another were

drawn on the basis of legal abstraction rather than on the basis of commercial reality. More significantly, the law often failed to extend consumer protection to many forms of credit (for example, credit and charge cards, instalment payments, revolving credit, etc.) and confusion arose as to what law applied to many consumer transactions (Rachagan (1992)).

Consumer protection legislation then entered into what may be considered to be the third phase by undergoing a shift in scope.

These third generation statutes attempt to be more comprehensive. For instance, all consumer credit came to be encompassed in one act. Similarly, fair trading statutes became more comprehensive and even imposed a general duty to trade fairly. Some salient features of these statutes may be noted:

- 1) They address both "procedural" unconscionability and "substantive" unconscionability.
- 2) The statutes cover delivery of both consumer goods and services, including all professional services.
- 3) A range of remedies, including rescission, the right to damages, punitive damages where appropriate, and injunctive and declaratory relief are provided for. It must be noted that the absence of a full, balanced and flexible range of remedies has the effect of emasculating the rights that such a statutes seek to confer upon the consumer.
- 4) The statutes permit individual consumers to seek redress and also provide for criminal penalties. Importantly, they confer upon a public officer (such as a Director of Trade Practices) and/or social action groups,

such as consumer organisations, the right to commence litigation on behalf of a consumer or a group of consumers.

- 5) The statutes vest given bodies with rule-making power to enable a swift response to evolving malpractice. In some instances, the rule-making power is vested in the Executive Branch of the government but advisory Committees, comprising both consumer and industry representatives are permitted to formulate the recommendations to be promulgated.
- 6) Special tribunals with simplified rules of procedure and evidence are created to hear consumer complaints.
- 7) To be equitable, they provide traders with a "due diligence" defence. Strict liability, especially in penal proceedings, is to be frowned upon. Justice must be available not only to consumers but also to traders and it is necessary that the law does not encourage unconscionable conduct on the part of consumers and consumer organisations.

Despite the enactment of these statutes, the process of enhancing the substantive rights of consumers is still incomplete. There exist many areas, and it is suggested, increasingly important areas, where the substantive rights of consumers have not been provided for. The area of consumer financial services may provide one example.

Insurance law in most countries is still not codified; where it is codified, it is still based upon notions of "good faith" and "materiality" which acquire their meaning from a few hundred years of case law; and these can, in operation, be oppressive to consumers. An

example will serve to illustrate this point.

An insurance contract is said to be unique in that unlike other contracts, it requires "utmost good faith" both from the proposer and the insurer. This means that the parties will be subjected to the contractual duty to avoid material misrepresentation as well as disclose material facts. It has been contended that the principle has in practice so evolved as to emphasise good faith from the insured to the extent of permitting the unscrupulous insurer to avoid his liabilities.

The duty of disclosure of material facts, be they sought or otherwise, are determined by the standards of a "prudent insurer" in fixing the premium or determining whether he will take the risk (**Lambert v CIS (1975) 2 Lloyd's Rep. 485**). It matters not whether the proposer regards the matter as material; the test is the view of the reasonable or prudent insurer. This remains the common law position. Statute law in many countries incorporates this definition.

This is clearly inequitable. What is in fact called for is not good faith but clairvoyance on the part of the insured, for the insured has to state not only what the insured in utmost good faith regards as material but what the mythical "prudent insurer" would regard as material.

The insured's task to reveal material facts is made invidious by the fact that particular classes of insurance will require the disclosure of different facts. Case law reveals that many of the matters that have been held material using the common law test would surely be regarded as nothing more than irrelevant information by a reasonable proposer:

- Criminal convictions, even if they occurred twenty-four years previously, are material (**Schoolman v Hall (1951) 1 Lloyd's Rep. 139**).

- Past refusal by insurers to grant a motor policy is material for the purposes of a fire policy (**Locker & Woolf Ltd. v Western Australian Insurance Co. (1936) 1 K.B. 408**).

Perhaps the harshness of the rule as regards disclosure of material facts is best exemplified by the leading case of **Lambert v CIS**. Mrs. Lambert signed a proposal form for an "All Risks" insurance policy to cover her own and her husband's jewellery. No questions were asked, and Mrs. Lambert gave no information about any previous convictions although her husband, to her knowledge, had been convicted some years earlier of receiving stolen cigarettes and had been fined. It was held that there was a duty of disclosure and the insurer did not have to pay. MacKenna J., who delivered the leading judgment also said:

"The present case shows the unsatisfactory state of the law. Mrs. Lambert is unlikely to have thought that it was necessary to disclose the distressing fact of her husband's recent conviction when she was renewing the policy on her little store of jewellery. She is not an underwriter and has presumably no experience in these matters. The defendant company would act decently if, having established the point of principle, they were to pay her. It might be thought a heartless thing if they did not, but that is their business, not mine. I would dismiss the appeal (of Mrs. Lambert) ([1975] 2 Lloyd's Rep. 485).

Laymen are generally not aware of the duty of disclosure and certainly unaware of what information would be regarded as material by a prudent insurer.

The law on disclosure of material facts should be reexamined. It will be fair that in consumer transactions, the duty to disclose should be that of facts which a reasonable man in the proposer's circumstances would

consider to be material. Furthermore, when a material fact is not disclosed and the insurer discovers that the insured has failed to comply with the duty of disclosure, the insurer should, in the absence of fraud, be obliged to pay the claim.

Consumer insurance applications are accompanied by proposal forms which include a printed questionnaire which the proposer is required to complete. The general rule is that the mere fact that an insured has answered questions in a proposal form does not relieve him of the general duty of disclosure (**Schoolman v Hall**). This is particularly harsh. When a consumer has answered detailed questions he will logically assume that he is under no duty to supply any further information.

If insurers with expertise and years of experience wish to have information to enable them to assess a risk and devise a questionnaire for this purpose then the insured should be relieved of any duty to disclose material information except in answer to questions posed by the insurer. Information which insurers consider to be material should be sought through clear questions in the proposal forms.

The situation in banking similarly invites reexamination. To borrow an example from Patrick Griffin (1990) – the almost universal practice of banks charging inward cheque dishonour fees. If a cheque is deposited into your bank account which is then dishonoured, a fee is frequently charged, even though the dishonouring was a matter the depositor had no control over. Where is the rule that entitles the bank to charge that fee? It is not in statutes and frequently not even in the written contracts for cheque accounts. "Custom and usage" may be applicable in governing transactions between those in the trade. However, in relation to consumer transactions it is inappropriate.

Justice for consumers, indeed any group of citizens, cannot be achieved unless the substantive law or rules are:

- a) accessible and identifiable – that is, that the lay person can first find them and secondly, understand them;
- b) unambiguous and acknowledged – that is, the parties, at least in general terms, have a common understanding of what the law or rules mean; and
- c) fair and equitable [Griffin (1990)]

The law governing many consumer transactions has yet to satisfy these criteria. Especially in the area of financial services, but also in transportation and the professions, the law is still very much a mixture of common law and contract; it is uncodified and inaccessible to anyone other than lawyers who specialise in the respective fields.

There is therefore, the urgent need to obtain a clear statement of the law governing consumer transactions.

2.2 BILATERAL STANDARD TERM CONTRACTS

Until codification of the laws governing many consumer transactions are effected as an interim measure, it will be necessary to focus on standard form contracts. The disadvantages of standard form contracts have been succinctly summarised by Professor Hondius (1987, 1990) as follows:

- a) a consumer will usually not go to the trouble of looking at standard contract terms which are lodged in a Chamber of Commerce or company headquarters (or even, as required in

some countries, with a Court) and which have subsequently been incorporated into the contract by reference;

- b) even if the consumer receives the full text of the general conditions, their length and typography do not invite a consumer to read the small print;
- c) even if the consumer does read the text, a consumer will often not grasp its full meaning;
- d) even if the consumer grasps the full meaning, a consumer may think that the event dealt with will not take place or that the supplier will not invoke the terms in such cases;
- e) a consumer may be under the false impression that the contract terms have been officially endorsed or at least are in compliance with the law;
- f) a consumer will usually not succeed in altering the contract terms – the agent or employee of the supplier will usually lack the authority to do so;
- g) these make it possible for suppliers to draft standard form contracts to the detriment of consumers.

It is, however, possible to overcome many of these disadvantages by using standard form contracts which have been negotiated by trade or professional organisations and consumer representatives. Many countries in Europe have moved in this direction. The Netherlands, Germany, Sweden and the United Kingdom all have their own experience with such negotiations. In France, the Calais-Auloy Commission has advocated the drawing up of "accords collectifs de la consommation", comparable to collective labour agreements, as one of the major consumer protection and redress measures.

The conditions under which these negotiations take place will clearly vary from country to country. The Netherlands experience provides an example [Hondius (1990)].

In 1978, the Dutch Commission for Consumer Affairs (CCA), was requested to advise the government on a proposed bill on standard form contracts. The CCA decided that there should not only be a negative approach to such contracts consisting of prohibitions and injunctions, but a positive approach as well. The CCA has since 1978 offered its services to trade and professional organisations to negotiate bilateral standard form contracts. At the disposal of the negotiating parties are a secretariat, a chairperson and office facilities. Over the years, detailed procedural rules to govern the negotiations were evolved.

The CCA has not waited for the initiative to come from industry and consumer organisations for action in this area. It has actively identified areas of high priority to consumers – for instance, the delivery of public services such as electricity, gas, mail, telephone and water, the installation and repair of plumbing, central heating and the services provided by a wide variety of professions and trades. Also, more recently, the CCA has attended to general banking conditions and conditions for the use of electronic fund transfers.

The general conditions agreed to will have to be supplemented by specific agreements to govern more specific relations. For example, the 1987 new general banking conditions were supplemented in 1989 by conditions for the use of electronic fund transfers. Other specific agreements will have to cover loans, mortgages, saving accounts, etc.

The Dutch experience, however, suggests that voluntary bilateral agreements are not always readily welcomed by the professions and the trades. Among the more successful ones were those that had a legislative back-up.

3. REDRESS MECHANISMS

The creation of new rights, though doubtless pleasing to consumer activists, is a meaningless gesture unless the recipients are realistically in a position to enforce them when necessary. The legal systems in most countries have not been able to cope adequately with the task of enforcement. Substantive rights depend on procedural rights.

3.1 OBSTACLES TO REDRESS IN THE COURTS

In general, there are a number of obstacles in the way of consumers seeking redress before the court. For convenience, these may be summarised under three headings – costs, self-generating imbalances, and, personal barriers to access [Duggan (1980); NCC (1989); Wiesner (1990)].

3.1.1 Costs

The most visible obstacle confronting the individual's access to the judicial system is the high cost of litigation. A priori, the cost of litigation, in the absence of a comprehensive legal aid scheme, effectively excludes the poor and even the moderate income earner from the courts. The rule common to courts in the English mould that costs follow the event is something of a palliative since it offers successful litigants the opportunity to recoup at least part of the expenses. However, the rule also requires the litigant, if unsuccessful, to pay the opponent's costs. In any event, the costs recouped by the successful litigant under the rule are party-party costs which are often substantially lower than the actual solicitor-client costs. Hence, even the successful litigant will nearly always be out of pocket.

In addition to the direct expenses of litigation, the intending litigant also faces indirect costs. The proceedings are frequently slow; a case may take a long time to be heard; it may be adjourned and require several court attendances by the consumer during working hours. All such indirect costs must be added to the calculus. The cost factor therefore builds into the judicial system a discrimination in favour of large claims where the chances of winning are high.

3.1.2 Self-Generating Imbalances

Most consumer disputes involve an institutional adversary well-versed with the legal system and capable of employing lawyers specialising in the required area of law. Mass processing of claims and the relative insignificance of each claim gives institutional litigants greater leverage in the bargaining process and permit them to effect pre-trial settlement where the odds are unfavourable to them. The reverse is generally true of consumer litigants as only cases which the institutions are confident of winning go to trial. The system favours the "repeat player" as distinct from the "first timer".

3.1.3 Personal Barriers to Access

Many consumers allow their legitimate claims to go by default because they are unaware of their rights. It is generally assumed that the crucial factor for this is ignorance. Perhaps even more relevant are the psychological barriers to be overcome. Consumers are frequently awed by the courtroom atmosphere, by the formality of legal proceedings, arcane legal language and by overbearing legal personnel. For the uninitiated, the judges' and advocates' robes can be intimidating. Personal barriers are more likely to be a disincentive to the poor but are shared to varying degrees by all people in infrequent contact with the legal system.

4. FACILITATING CONSUMER REDRESS

The methods employed to overcome the problems experienced by consumers in dealing with the legal system may be classified into two categories. The first involves measures directed at facilitating access to the ordinary courts and the second, measures which seek to by-pass these through the creation of court substitutes.

4.1. ACCESS TO THE COURT

Measures adopted or proposed to ensure access to the courts take a variety of forms. Many of these reforms may not be designed to cater for consumer cases only. They are often part of the general concern to make the courts more efficient and accessible to all citizens and consumers qua consumers will also be beneficiaries of the changes. Reforms have been in such matters as;

- the nature of the proceedings
- the structure of the court
- the feasibility of limiting new procedures to small cases only
- the rules governing limitation periods
- the conduct of cases and the rules governing evidence
- the form of the proceedings
- the role of the judge
- the representation of the parties
- the right to appeal

In many countries, the changes were provided for in smaller claims through what came to be

known as small claims procedure (or courts) [NCC (1989); Whelan (1990)].

This paper will now focus on a few developments of special reference to consumer access to justice.

4.1.1 Extending the Reach of Legal Services

A variety of ways have been employed in different countries to handle the cost factor – legal aid for the needy, legal expense insurance operated by commercial insurance companies and a contingent fee system. The cost can be further lowered once the legal profession accommodates itself to the notion that many of the routine functions currently performed by lawyers at prices in keeping with their own "professional status" can well be performed by trained para-professionals at substantially reduced costs to the consumer.

It must be recognised that legal aid is a dynamic, not a static concept. In times past, legal aid merely meant providing legal advice and representation to people who could not afford to buy these services. Such an approach addressed only the cost barrier, but failed to address the barriers caused by other problems encountered by the poor. Such an approach assumed that the poor are able to recognise legal claims and seek assistance. It failed to help the poor understand their rights and identify the areas in which they may be entitled to legal remedies. The new approach in legal aid is to view it as a part of the process of the disadvantaged acquiring critical awareness about rights and the law, the ability to exercise those rights, and the capacity to mobilise for change. In some countries, community legal education and the provision of auxiliary welfare services are considered a crucial part of the package of legal aid; and others have experimented with the provision of legal services through alternative means, such as para legal personnel.

Comprehensive legal aid calls for substantial commitment of financial and human resources that many Third world nations can ill-afford. Legal aid therefore, cannot be the function of governments alone but has also to be the responsibility of the legal profession and the law schools. The legal profession is by its training and standing in society, best equipped to contribute significantly in this area of social responsibility.

4.1.2 Public Interest Litigation

These are private proceedings brought in the public interest and, in the case of consumer claims, for relief by way of an injunction to restrain the defendant from engaging in certain activity, or for a declaration that the defendant's conduct is illegal or even a writ of mandamus ordering a public official to discharge a duty or perform a function according to law. The plaintiff no doubt will gain from the proceedings but the aim is that all those affected will benefit.

In many countries, a major obstacle to public interest litigation is the requirement that the plaintiff must have standing to sue. It is required that the plaintiff have a direct and personal interest in the matter to be litigated. The resistance to any relaxation of the rules governing standing is that the court may be required to rule at large on public interest issues and thus encroach on the legislative and executive function. This concern is countered by the argument that standing is required to invoke the jurisdiction of the court not to extend what is justiciable; the nature of the action will still remain the same but a wider range of persons will be permitted to sue.

In an increasing number of countries, however, the law on standing has been substantially modified by legislation. Consumer associations have been given the required standing and are permitted to bring public interest litigation or even attempt

substituted actions on behalf of a consumer. The Thai and Indian Consumer Protection Acts may be cited as examples.

The Consumer Protection Act, 1979, of Thailand provides that any association which has as its object the protection of consumers or opposition against unfair trade competition and whose regulations with respect to the board, members and methods of operation of the association are in accordance with the conditions prescribed in Ministerial Regulations, may file application for its recognition, so that the association has the right and power to institute legal proceedings (section 41).

In the legal proceedings for infringement of the consumer's rights, the association which has been recognised by the Board (under section 40) has the right to institute civil and criminal proceedings or bring any legal proceedings for the protection of the consumers and shall have the power to sue for the recovery of damages on behalf of its member if it has obtained the power of attorney to claim damages from its member (section 41).

The Consumer Protection Act, 1986, of India provides that a complaint regarding any goods sold or delivered, or any service provided, may be filed with the relevant consumer disputes redressal agencies *inter alia* by "any recognised consumer association, whether the consumer to whom the goods sold or delivered or service provided is a member of such association or not" (Section 12(b)). The Explanatory Note to this section stipulates that "for the purpose of this section "recognised consumer association" means any voluntary consumer association registered under the Companies Act, 1956, or any other law for the time being in force".

4.1.3 Class Actions

A class action is a legal procedure to enable

many persons to combine to recover damages or other compensation in the one action. The concept dates hundreds of years and by the 17th century, English Chancery practice had developed it in the Bill of Peace [Francey, (1988)]. The procedure then came to be incorporated in the Rules of the Supreme Court in the present Order 15 rule 12 and basically permits a representative action. But it is in the United States that the most extensive development of this has taken place. Through the US Federal Rule of Civil Procedure 23, the US has developed a comprehensive procedure for the authorisation and determination of legal action by or on behalf of numerous people seeking damages.

The structure of Rule 23 now is that, once certain pre-requisites are met, class actions are maintainable basically

- i) where separate actions would create a risk of inconsistent or varying adjudication; or
- ii) where a class relief is objected to but is appropriate; or
- iii) common questions predominate over individual issues and the class action is superior to other available methods for the fair and efficient adjudication of the controversy.

The pre-requisites are:

- i) the class is so numerous that joinder of all members is impracticable;
- ii) There are questions of law or fact common to the class;
- iii) the claims or defences of the representative parties are typical of the claims or defences of the class; and
- iv) the representative parties will fairly and adequately protect the interests of

the class.

Class actions can serve many functions. In the context of consumer redress they permit the resolution of disputes where each member's stake is so small that there is no incentive for each member to litigate separately. By consolidating the individual claims, class actions raise the amount at stake to a level which outweighs the risks involved in the court action. It also eases the psychological barriers to litigation. Importantly, class actions bring to the Courts cases that the Courts would otherwise not have an opportunity to rule on and thus serve as a deterrent to those producers who make substantial gains by defrauding large numbers of consumers, each by a little but in total, by a substantial sum. The class action in the U.S. has been hailed by its proponents as "one of the most successful socially useful remedies in history". It has also been criticised as an "engine of destruction" or "legalised blackmail" [Francey (1988)]. [Francis R. Kirkham (1979, at 216) raises very pertinent questions that proponents of a liberal class action scheme will have to address:

"Have these actions fulfilled the hope that they would serve as a bona fide means of reimbursing small consumers? Have the courts so shaped their processes as to achieve a just resolution of the merits of the claims? What social purpose is served by going through the fiction of making millions of uninterested persons parties to a suit in a court of justice, aggregating all of their trivial claims into enormous sums so crushing on the defendants as to induce huge settlements to avoid destruction, and then paying these sums only in small part to the consumers, who may or may not have

been injured, with the balance going in exorbitant attorney's fees and to the state, or to some public purpose designated by a benevolent judge?

The answer usually given is, not that such judgments are necessary to compensate injured consumers – all consumers with a worthwhile interest are free to join in a single suit or in a suit already pending in which costs and attorney's fees will be allowed – but rather, that they serve to deter violations of the antitrust and securities laws, and like statutes, and to compel defendants to disgorge ill-gotten gains. These reasons, of course, simply expose the hypocrisy of masquerading what in fact is a criminal proceeding with extravagant penalties in the clothes of a civil suit."]

It must be noted, however, that class actions do not confer substantive rights nor do they expand the scope of what is justiciable. It is merely a change in the rules governing procedure. Much of the criticism against the U.S. class action rule is really the consequence of other features peculiar to the U.S. legal system – a generally more litigious society, a system of unbridled contingent fee and jury awards of damages. Each country will have to consider the merits of the class action in the light of the circumstances prevailing within its boundaries. It is crucial, however, that if a system of class actions is permitted it must not duplicate the ills associated with the U.S. system.

4.2 COURT SUBSTITUTES

Court substitutes, or to use the term now very much in vogue, Alternative Dispute Resolution mechanisms (ADR), involve a whole range of permutations with only one factor in common – they each do not involve court-based litigation. Each scheme has its own peculiarities, strengths and weaknesses, and consequently generalisation is difficult. For convenience, they are considered under four categories – statute-based tribunals, arbitration, statutory ombudsman scheme and voluntary ombudsman scheme [Wiesner (1990)].

4.2.1 Statute-Based Tribunal

The distinguishing feature is that such tribunals are governed by statute and in most cases, the matters dealt with by these tribunals are required by statute to be referred to it. There is no recourse to the court in these cases and the decisions of these bodies are binding on both parties. Frequently, no appeal against the decisions is possible except by way of a prerogative writ. This in itself has been considered a weakness. Consequently, variations of these schemes provide for a hierarchy of tribunals to which appeals lie. Commonly, disputes are heard and determined by a mixture of experts and "lay" representatives. The lay representatives may be required to be "capable of representing the consumer interest".

The advantage of such schemes is that they address the cost factor, provide for simplified procedures and generally involve less formal proceedings. They have been held to be more speedy avenues for redress but where appeals are provided for, this has not always been the case.

Perhaps the most revolutionary of such schemes, is the consumer disputes redressal bodies established under the Consumer Protection Act 1986, of India. The Act

established a hierarchy of adjudicating bodies – a district forum in each district, a State Commission in each state and a National Commission. The district forums handle complaints of up to Rupees 500,000; the State Commissions handle claims of between Rupees 500,000 to 2 million and the national forum adjudicates complaints in excess of Rupees 2 million. Appeal from the original orders of the District Forum to the State Commission, and from the State Commission to the National Commission are provided for. The composition of these adjudicating bodies is novel. Only the President is required to have a background in law – a judge or person qualified to be one. The other members (two at the district and state levels and four at the national level) need not have had any training in law. At the district level, the two other members are required to be:

- "(b) a person of eminence in the field of education, trade or commerce; [and]
- (c) a lady social worker". (Section 10)

In the case of state and national commissions, the additional persons need be:

"...persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman:" (emphasis added) (Sections 16 (b) and 20 (b)).

These newly created bodies, however, remain under the ultimate supervision of the courts, since any person aggrieved by an order made by the National Commission may prefer to appeal against such order, to the Supreme Court (Section 23).

4.2.2 Arbitration

This involves the reference of a dispute to an impartial third party, usually an expert in the field, chosen by the parties to the dispute, who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard. Arbitration can be by mutual and free consent of the parties and the parties can choose and agree on the procedure to be observed in arbitration. Arbitration in consumer disputes often arises as a result of an arbitration clause in contracts (for example, insurance contracts) providing for compulsory arbitration in case of a dispute as to rights or liabilities under such a contract. Though not yet in the case consumer disputes, arbitration can be provided for by way of statute (for instance, in labour disputes involving public employees). Nobody can be forced to agree that disputes will be referred to arbitration, but once arbitration is agreed upon, a relevant dispute can be arbitrated even if one of the parties refuses to co-operate.

In consumer contracts, the arbitration process is often presented as a condition precedent to litigation in the courts. Compulsory arbitration clauses come in various forms, the more odious ones even attempt to oust the jurisdiction of the courts. An important aspect is the scope of the arbitration provided for, and it is necessary to distinguish between interest and grievance arbitration. Interest arbitration involves settlement of the terms of a contract between the parties as contrasted with grievance arbitration which concerns the violation or interpretation of an existing contract. Consumer complaints usually involve grievance arbitration.

Arbitration procedures are meant to be less formal than those of the Courts. A case may be determined on the basis of written evidence alone or might involve a hearing. Most arbitration schemes for consumer

disputes are free to the consumer and exclude legal representation. The determination of the arbitrator is binding on both parties and only a very limited right of appeal is available and this, by way of prerogative writ.

In many countries, private organisations or even an association of arbitrators exist. In Malaysia, there is a national organisation of arbitrators known as the Malaysian Institute of Arbitrators. Such associations of arbitrators often produce Codes of Ethics and Procedural Standards for use and guidance of arbitrators. Such codes will be enriched by a meaningful participation of consumer representatives.

4.2.3 Statutory Ombudsman

The Ombudsman concept is of Nordic origin. Originally, it was a public office to which people could bring grievances connected with the government – the ombudsman stood between and represents the citizen before the government. In the 1970s, the institution of the Consumer Ombudsman was established in the four Nordic countries – Denmark, Finland, Norway and Sweden. The consumer ombudsman is a supervisory body with the task of ensuring that marketing methods used by business when selling goods or providing services conform to the law [Graver (1986)].

This concept has since been emulated in many countries and established by statute. The ombudsman is usually an expert in law but not necessarily in the particular area concerning disputes. The statute may specify powers and procedures or provide how these are to be determined and monitored – under the authority of some independent body or even an organisation whose members would be required to participate in the scheme.

The statutory ombudsman does not act in a judicial capacity and usually has wide powers not only to weigh the merits of each party's case but also to investigate the matter. The

decision arrived at is not purely on legal points but also on "good industry practice" and the need for change. Proceedings are usually informal and can include oral as well as written submissions. Legal representation is not usual and the service is often free to consumers. The consumer is not required to refer the case to the ombudsman and awards are not binding on the consumer, though they often are on the other party.

The 1991 Consumer Act of the Philippines (Republic Act No. 7394) introduces a permutation of statutory ombudsman incorporating aspects of arbitration. The Departments of Government concerned i.e. the Department of Trade and Industry, Department of Health and the Department of Agriculture may each, within their area of competence, commence an investigation upon petition or upon letter-complaint from any consumer and upon finding "of a prima facie violation of any rule or regulation promulgated under its authority, it may motu proprio or upon verified complaint, commence formal action against any person who appears responsible therefor" (Article 159). The same Article enjoins the department to "establish procedures for systematically logging in, investigating and responding to consumer complaints...assuring as far as practicable simple and easy access on the part of the consumer to seek redress for his grievances". The concerned Department Secretaries are required to appoint consumer arbitration officers (Article 110), each college-trained and with a minimum of three years experience in the field of consumer protection (Article 161), to mediate, conciliate, hear and adjudicate all consumer complaints (Article 162). The Consumer Arbitration Officers are required to "first and foremost ensure that the contending parties come to a settlement of the case" and "in the event that a settlement has not been effected the officer may proceed to formally investigate and decide the case" (Article 163). A wide range of penalties may be imposed even if not prayed for in the

complaint. These include cease and desist order, assurance to recall, replace, repair or refund the money value, restitution or rescission of the contract and the imposition of fines of between Pesos 500 to 300,000 depending on the gravity of the offence (Article 164). Any order, not interlocutory, becomes final and executory unless appealed to the Department Secretary within 30 days. The decision becomes final after 15 days from receipt of it unless a petition for certiorari is filed with the Court of Appeal (Articles 165 and 166).

4.2.4 Voluntary Ombudsman Scheme

Voluntary Ombudsman Schemes are not governed by statute but are usually voluntary schemes set up as incorporated bodies with the participating companies as members. The Ombudsman in such schemes is governed by the Articles of Incorporation of the Scheme and is frequently answerable to a Council which may or may not include consumer representatives. The members of the scheme are usually required to accept the decisions of the Ombudsman but consumers are not similarly bound.

An example of such a scheme is the Insurance Ombudsman Bureau of Britain which has been emulated in several other countries, including Malaysia.

The Malaysian scheme "The Insurance Mediation Bureau (IMB)" is established as a company limited by a guarantee under section 24 of the Companies Act 1965. The expenses of the IMB are met from annual levies raised from the member insurance companies. Structurally, the IMB has two bodies, the Board of Directors and the Council. The Board, comprising representatives of the member companies, is responsible for the management and administration of the business and affairs of the Bureau. The Council consists of not more than five persons, two of whom are Board members,

one representative from the Federation of Malaysian Consumer Associations (FOMCA), one representative from a university in Malaysia and one other person nominated by the Board who does not fall into any of the categories mentioned above. The main function of the Council is to appoint a Mediator, define the Mediator's powers, duties and terms of reference. The Mediator reports to the Council on matters relating to the Mediator's functions and obtains advice from the Council from time to time.

The role of the Mediator is to act as an independent counsellor, conciliator, adjudicator or arbitrator in cases referred to him by industrial policy holders relating to a policy of personal insurance. The mediator is empowered to make awards of up to RM 50,000 which are binding on the insurance company but not the policy holder.

One of the principal weaknesses of such schemes is that membership is not compulsory but this can be overcome if the regulating authority can bring "pressure" to bear to effect membership by all eligible companies. In the Malaysian case, all general insurance companies are members of the Insurance Mediation Bureau.

5. EFFECTIVENESS OF REDRESS MECHANISMS

Given the various approaches to enhancing the consumer's right to redress, it is necessary to evolve a set of criteria to assess their effectiveness. We have to agree on the requirements of an ideal system [Griffin (1990); Wiesner (1990); Mitchell (1991)]. The paper will now briefly address this issue.

5.1 ACCESS

The consumer must be able to easily bring a complaint and this requires:

- Cost: The scheme must be cheap, or ideally, free to the consumer.
- Procedure: The procedure adopted must be simple and in any case, procedural error should not serve to prejudice a claim.
- Evidence: The stringent requirements of court-based rules of evidence must be tempered with realism and the primary focus must be justice.
- Comprehensive: It must be possible for the complainant to resolve all aspects of his claims at one forum. For instance, in arbitration, both interest and grievance must be addressed. ADR schemes must apply to all eligible producers and not be confined to only some members of an industry.
- Directly Accessible: The consumer must be able to have direct access and not be required to go through other stages before being referred to such a scheme. For example, the requirement that a complaint be first referred to senior management of a company before being referred to the scheme serves to delay access to justice and deny access to those not persistent enough to pursue their claim.
- Well-advertised and understood by consumers: There must be sufficient publicity for the scheme and guidelines the use of the scheme in simple language must be made readily available.
- Availability: Be available to all consumers and not only to those in the larger urban centres.

5.2 FAIRNESS

The consumer must not be shortchanged and the quality of justice meted out must not be second-class.

- Public Accountability: The scheme must be open and a reasoned explanation of the decision must be made public. The decisions need to be published and practice notes must record non-binding precedents.

- Independent: The scheme must be truly independent and not be subverted by industry. Even in a voluntary scheme funded by industry, the officials must be appointed by an independent body and the terms of their appointment and remuneration should not be at the pleasure of the industry. Any governing body must have a majority of independents and consumer representatives.

- Natural Justice: The rules of natural justice must apply and the consumer must have the right to expert opinion and advice before submitting the complaint.

5.3 EFFECTIVENESS

The scheme must provide redress and to this end:

- Scope: The range of remedies provided must be comprehensive and the financial jurisdiction of the awarding body must be adequate to satisfy the claims submitted to it.

- Speed: The scheme must provide for the speedy resolution of the dispute.

- Address systematic problems: The scheme must not only provide a resolution of the disputes of individual consumers but must also address systematic problems. For this the scheme must be given investigative powers.

- Decisions binding on industry: The decisions handed down must be binding on industry. However, where these schemes are voluntary schemes managed by industry, the consumer's right to reject the award and have recourse to the Court must be ensured.

6. CONCLUSION

Any redress mechanism is dependent upon substantive rights. Redress mechanisms cannot provide, except as charity, what is not a substantive right. There should therefore not be any trade-off between the granting of substantive rights and the creation of redress mechanisms. Redress mechanisms must complement, not substitute the development of substantive rights.

Reform of the court system to ensure access must continue. Although the primary function of judicial power is to resolve disputes between the immediate litigants, the Courts do have a secondary rule-making function. This, the courts achieve, inter alia, by the doctrine of precedent and the power to award injunctive and declaratory relief. If certain classes of individuals, in this instance, consumers and especially the poorest amongst them, do not have realistic access to the Courts, then the body of judge-made rules will not reflect their interest. Judge-made rules will become increasingly distorted, to the detriment of consumers. The judicial system must remain sensitive to the consumer

interest and judge-made rules must be consonant with this. The tax-funded legal system must not be monopolised by large corporations and the wealthy.

Though ADRs are very much touted, they must be critically appraised. Often, these mechanisms hand out second-class justice, operate in favour of industry either intentionally or because consumers are unable to identify their statutory or contractual rights and the factors relevant to their position, present their case in a cogent and coherent manner and determine whether they have obtained a reasonable settlement. Especially when justice is privatised through industry ombudsman schemes, systemic problems may be swept under the carpet and corporate compliance minimised.

Some of the privatised schemes have attempted to incorporate consumer representation in their governing councils. This has been rightly welcomed by consumerists. Yet, even this consumer representation is not always a positive factor for it may merely be nominal. Unless consumer representation is significant, unless consumer representatives are well-informed and diligent, unless they resist the charm of the corporate purse and do not become seduced by apparent power and influence of their appointments, consumer representation will become a mere window dressing and a detriment to consumer interest.

Finally, and most importantly, efforts to obtain substantive and procedural rights must be directed to obtaining it for those who do not have, or are unable to exercise, these rights. These efforts must not be hijacked by those who already enjoy a disproportionate share of rights and the state's resources. Additional redress mechanisms must be sought not as a luxurious alternative for those who already have access to justice but for those who are currently denied access to justice.

REFERENCES

- Aron, N. (1989) *Liberty and Justice for All, Public Interest Law in the 1980s and Beyond*, London: Westview Press.
- Australia, The Law Reform Commission (1988) *Grouped Proceedings in the Federal Court*, Report Number 46.
- Australia, The Law Reform Commission (1986) *Standing in Public Interest Litigation*, Report Number 27.
- Bourgoignie, T. (1992) Characteristics of Consumer Law, *Journal of Consumer Policy*, 14: pp 293-319, 1992.
- Burger, W.E. (1990) *Delivery of Justice: Proposals for Changes to Improve the Administration of Justice*, Minnesota: West Publishing Co.
- Burton, G. (1990) A Banking Ombudsman for Australia *Journal of Banking and Finance Law and Practice*, Vol. 1, No. 1, April 1990.
- Dias, C.J. (1985) *Legal Aid in Asia: A Basic Human Right*, *Third World Legal Studies - 1985*, International Third World Legal Studies Association and the Valparaiso University School of Law.
- Duggan, A.J. (1980) *Consumer Redress and the Legal System* in Duggan, A.J. and Darvall, L.W. (1980) *Consumer Protection Law and Theory*, Sydney: The Law Book Company Ltd., pp 200-225.
- Edling, A. (1988) *Settling Consumer Disputes Out-of-Court: A Swedish Alternative*, National Swedish Board for Consumer Policies (mimeo).
- Francey, N. (1988) *Consumer Class Actions*,

Canberra: Australian Federation of Consumer Organisation Inc.

Graver, K. (1986) A Study of the Consumer Ombudsman Institution in Norway with Some Reference to Other Nordic Countries, 1: Background and Description, *Journal of Consumer Policy* 6, 1986, 1-23.

Griffin, P. (1990) Access to Redress in National Consumer Affairs Directory (Australia) (1990) *New Directions in Consumer Financial Services*, pp 105-109.

Hondius, E.H. (1987) Standard form Contracts - A Better Way for Both Parties in National Consumer affairs Advisory Council (Australia) (1990) *New Directions in Consumer Financial Services*, pp 93-103.

Hondius, E.H. (1987) *Unfair Terms in Consumer Contracts*, Utrecht.

India, *Consumer Protection Act, 1986*, No. 68 of 1986.

Malaysia, Insurance Mediation Bureau (1991) *Memorandum and Articles of Association of the Insurance Mediation Bureau*.

Mark, J.B. (1987) *Making Alternative Dispute Resolution Work, An ENDISPUTE Guide for Practising Lawyers and Businesspeople*, Washington D.C.: Endispute, Inc.

Mitchell, J. Ombudsman Schemes for Financial Services in the U.K.: A Consumer View, *Journal of Consumer Studies and Home Economics* (1991) pp 299-306.

Philippines, *The Consumer Act of the Philippines, Republic Act No. 7394*.

Rachagan, S.S. (1992) *Consumer Law Reform - A Report*, Kuala Lumpur: UNDP & SCA.

Searles, I. (1990) Self-regulation as an Effective Alternative to Legislation and Litigation: The Case of Electronic Banking, *Journal of Banking and Finance Law and Practice*, 1990, pp 125-142.

Seymour Jr., W.N. (1975) *Why Justice Fails*, New York: William Morrow & Co.

Singer, L.R. (1990) *Settling Disputes, Conflict Resolution in Business, Families and the Legal System*, San Francisco: Westview Press.

Thailand, *Consumer Protection Act 1979*, B.E. 2522.

Thomas, R. (1989) Alternative Dispute Resolution - Consumer Disputes, *Civil Justice Quarterly*, 1989, pp 206-219.

United Kingdom, Report of the Committee (Chairman: Lord Crowther) (1971) *Consumer Credit*, London: HMSO.

United Kingdom, National Consumer Council (1989) *Ordinary Justice, Legal Services and the Courts in England and Wales: A Consumer View*, London: HMSO.

United Kingdom, National Consumer Council (1988) *Report on Ombudsman Schemes in the Private Sector*, London: NCC.

United Kingdom, National Consumer Council (1992) *Court Without Advice: Duty Court-Based Advice and Representation Schemes*, London: NCC.

Baxi, U. (1985) Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India, *Third World Legal Studies - 1985*, International Third World Legal Studies Association and the Valparaiso University School of Law.

Whelan, C.J. (ed.) (1990) *Small Claims Courts - A Comparative Study*, Oxford: